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ADVISORY

10-01: General and Special Legislation

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2010 State Ethics Commission Rulings (https://www.mass.gov/files/documents/2016/08/re/2010-rulings.doc)

The purpose of this Advisory is to clarify the meaning of the terms "general legislation" and "special legislation" for purposes of c. 268A. This Advisory overrules prior Commission precedent to the extent inconsistent with the newly approved definitions.

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Introduction

State employees are prohibited by G.L. c. 268A, § 6 from participating in any "particular matter" in which they, their immediate family members, and other close associates, such as employers, have a financial interest. The definition of a "particular matter" expressly exempts "enactment of general legislation by the general court," c. 268A, § 1(k). State employees, therefore, can participate in "general legislation" even if they or their immediate family members or business associates have a financial interest in it, although they will have to file a disclosure before doing so if the matter will "substantially affect" their personal financial interests, c. 268A, § 6A, or create an appearance of a conflict, § 23(b)(3). They cannot participate in "special legislation" in which they, their immediate family members, or their business associates have a financial interest.

The distinction between "general" and "special" legislation is, therefore, a significant one, in that it is the distinction between matters in which state employees can participate even if they have a financial interest, and those in which they cannot. While this distinction is of particular importance to legislators and their staff, it is also significant for other state employees who work on legislation, since the Commission has held that the exclusion of "general legislation" from the statutory definition of a "particular matter" applies to matters involving executive as well as legislative employees, *EC-COI-85-69.*

The purpose of this Advisory is to clarify the meaning of the terms "general legislation" and "special legislation" for purposes of c. 268A. This Advisory overrules prior Commission precedent to the extent inconsistent with the newly approved definitions.

1. Revised interpretation

For the reasons set forth below, on April 16, 2010, the Commission voted to revise its interpretation of the terms "general" and "special" legislation as follows:

(a) The Commission eliminated its existing interpretation of the distinction between "general" and "special" legislation, which was based on case law under the Home Rule Amendments. In particular, the Commission eliminated the interpretation that legislation with any one of the attributes of special legislation, such as the use of the words "notwithstanding the provisions of any general or special law to the contrary," must automatically be considered "special."

(b) The Commission replaced its existing interpretation with the definition of "special" legislation used in the Article 10 context, that is, "legislation addressed to a particular situation, that does not establish a rule of future conduct with any substantial degree of generality, and may provide ad hoc benefits of some kind for an individual or a number of them." Commissioner of Public Health v. Bessie M. Burke Memorial Hospital, 366 Mass. 734, 740 (1975)

(c) The Commission created a presumption against finding legislation to be "special," based on the constitutional concerns created in this area by Articles 21 and 22.

(d) For purposes of the conflict of interest law, the Commission will presume legislation to be general, and will find it to be special only if it does not establish any general rule, and only provides a benefit or benefits to individuals in a particular situation.

2. Prior Commission precedent concerning "general" and "special" legislation

Numerous Commission advisory opinions have addressed the distinction between "general" and "special" legislation. The usual Commission formulation was that "legislation which is temporary, which does not amend the General Laws, and which creates an exception or special rule which does not apply to other similarly situated individuals or organizations will be regarded as special legislation." *EC-COI-95-9; EC-COI-90-17; EC-COI-89-8.* "On the other hand, legislation which is intended to be permanent, which amends the General Laws, and which establishes rules which are uniformly applicable to all individuals or organizations similarly situated will be regarded as general legislation." *EC-COI-90-17; EC-COI-89-8.*

The following factors have been identified as attributes of special legislation under Commission precedent. Commission precedent does not discuss whether any of these factors are more significant than others, or if, for instance, only one factor is present, what the outcome should be. In giving advice, the past practice of the Commission's Legal Division has been that if any of these factors is present, the legislation should be considered "special."

- temporary in nature, *EC-COI-95-9, EC-COI-90-17, EC-COI-89-8, EC-COI-85-69*
- does not amend General Laws, *EC-COI-95-9, EC-COI-90-17, EC-COI-89-8, EC-COI-85-69*
- does not apply to other similarly situated individuals, *EC-COI-95-9, EC-COI-90-17, EC-COI-89-8, EC-COI-82-175.*
    - Examples:
        - bill increasing bonding authorization for a particular state agency, *EC-COI-90-17, EC-COI89-8, EC-COI-85-69*
        - bill requires a particular state agency to relocate its offices to a specific address, *EC-COI-89-8*
        - practically affects a single community, even if drafted in more general terms, *EC-COI-90-17, EC-COI-89-8, EC-COI-82-169, EC-COI-82-153, EC-COI-82-39, EC-COI-81-81*.

- Examples:
    - annual budget approval for line item in county budget, *EC-COI-89-8, EC-COI-82-9*
    - home rule legislation affecting the payment by one municipality of retirement supplements to its retired employees, *EC-COI-90-17, EC-COI-89-8, EC-COI-82-175*
    - legislation transferring state-owned land in a municipality, *EC-COI-90-17, EC-COI-89-8, EC-COI-80-46*
    - legislation imposed condition restricting receipt of local aid funds by a particular community, *EC-COI-90-17, EC-COI-89-8, EC-COI-82-169*

- uses the phrase "notwithstanding the provisions of any general or special law to the contrary," as this indicates that the legislation does not amend the General Laws but rather creates an exception to those laws, *EC-COI-89-8* (although in practice such legislation may in fact change application of General Laws) .

3. Criticisms of precedent

The Commission has reconsidered its precedent with respect to the distinction between general and special legislation in light of two specific criticisms.

First, the current interpretation has been criticized as failing to take into account the fact that a conclusion that proposed legislation is "special" will likely prevent one or more legislators from representing their constituents on that matter. This, it was suggested, was in tension with Articles 21 and 22 of the Massachusetts Constitution. Those articles relate respectively to the apportionment of the House and Senate, but from time to time have also been mentioned as incorporating a general constitutional right of voters to be represented in the General Court. Opinion of the Justices to the Governor, 361 Mass. 897, 902 (1972) (citing "the republican principle that all shall have a right to be represented"); Newman v. Commissioners to Apportion Suffolk County, 354 Mass. 617, 622 (1968), citing Attorney General v. Suffolk County Apportionment Commissioners, 224 Mass. 598, 606 (1916) (it is the "indubitable design of the Constitution" to maintain "equality of influence in shaping legislation"); Lamson v. Secretary of the Commonwealth, 341 Mass. 264, 269 (1960) (constitutional right of the people to equal apportionment). It was suggested that the Commission's interpretation of what is "special" legislation was too broad, and therefore denied representation to voters whose legislators were unable to participate in matters because those matters were considered "special" legislation.

Second, the Commission's prior interpretation was based on court precedents under the Home Rule Amendment to the Massachusetts Constitution, which post-dated enactment of the conflict of interest law. The suggestion was made that it would be more in accordance with the legislative intent behind § 6 to base the

Commission's interpretation on precedent concerning the general/special distinction that existed at the time the conflict of interest law was enacted.

The Commission has considered these criticisms and determined that they have merit. Accordingly, the Commission has revised its interpretation of the "general/special" distinction as set forth above.

4. History of the "general"/"special" distinction in Massachusetts

The distinction between "general" and "special" legislation is neither new, nor peculiar to Massachusetts. Sutherland, Statutes and Statutory Construction (Norman J. Singer, 6 th ed., pp. 211-212). While most states (forty) have express constitutional prohibitions against special legislation, Massachusetts and the other New England states do not. Id, p. 212. In Massachusetts, this may be because long-standing case law achieves the same effect.

Beginning with the 1814 decision in Holden v. James, 11 Mass. 396, the Supreme Judicial Court has interpreted Article 10 of the Declaration of Right of the Massachusetts Constitution, the "standing laws" provision, as prohibiting the enactment of special legislation that singles out any person for special privileges or advantages at the expense of the rights of another. Holden involved a statute which gave Holden, by name, the right to pursue a specific time-barred claim. The Court held that the constitutional guarantee of protection to every citizen "in the enjoyment of his life, liberty, and property, according to standing laws" was violated by an enactment which "suspend[ed] the law with respect to any one citizen, or any one particular suit, leaving it in full force as to all others." 11 Mass. at 402. It stated further: "It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that any one should be subjected to losses, damages, suits, or actions, from which all others, under like circumstances, are exempted." 11 Mass. at 403-405.

Subsequent Supreme Judicial Court decisions throughout the 19th and early 20th centuries reiterated the Holden precedent in terms of a prohibition against special legislation singling out a particular individual for favorable treatment, accompanied by a corresponding injury to someone else. Commissioner of Public Health v. Bessie M. Burke Memorial Hospital, supra, 366 Mass. at 740-745 (collecting cases); Paddock v. Town of Brookline, 347 Mass. 230, 233-240 (1964) (same). The former case, citing Forster v. Forster, 129 Mass. 559, 561-562 (1880) defined "special or private laws," "very roughly," as "legislation addressed to a particular situation, that does not establish a rule of future conduct with any substantial degree of generality, and may provide ad hoc benefits of some kind for an individual or a number of them." Commissioner of Public Health v. Bessie M. Burke Memorial Hospital, supra, 366 Mass. at 740.

The Holden principle remains good law. Kienzler v. Dalkon Shield Claimants Trust, 426 Mass. 87, 89 (1997) (statutes which allowed single named individuals to maintain suits that would otherwise have been barred by a general statute were held to violate Article 10). This principle does not bar all special legislation; to the contrary, the General Court has power to enact special legislation in many contexts. Commissioner of Public Health v.

Bessie M. Burke Memorial Hospital, supra, 366 Mass. at 740. What it does not have power to do, under Holden and subsequent cases, is to enact special legislation in the absence of a public purpose. Kienzler, supra, 426 Mass. at 90-92; City of Boston v. Keene Corp., 406 Mass. 301, 304-309; Commissioner of Public Health v. Bessie M. Burke Memorial Hospital, supra, 366 Mass. at 740-745.

5. 1962: use of the term "general legislation" in the conflict of interest law

The Article 10 cases just described were the backdrop against which the conflict of interest law was enacted in 1962. The exclusion of "enactment of general legislation by the general court" from the definition of a "particular matter" was part of the original legislation, Chapter 779 of the Acts of 1962.

In general, the draftsmen of the Massachusetts statute took as their model the federal conflict of interest statute, and specifically the House bill which was pending at that point and which was subsequently enacted into law, with some changes, as federal law. Buss, *The Massachusetts Conflict of Interest Statute: An Analysis,* Boston University Law Review, Vol. XLV, No. 3, p. 303. However, the exclusion of "general legislation" from the definition of a particular matter has no federal counterpart. It seems reasonable to conclude that the drafters intended the term "general legislation" to be understood in light of the century and a half of Massachusetts precedent described above concerning the distinction between "general" and "special" legislation in the context of Article 10 litigation.

6. Interpretation of the term "general legislation" in the conflict law by the Attorney General and subsequently the Commission

The first request for an explanation of the distinction between "general" and "special" legislation in the context of the conflict of interest law was a 1972 request to the Attorney General, who was charged with interpreting the conflict of interest law prior to the creation of the Commission in 1978. The Attorney General declined to do so, stating: "Please be advised that the words "general" and "special" are descriptive in nature and relate to the application of legislation. Beyond this, I cannot further define these words without clouding their commonly accepted meaning." Attorney General Conflicts Opinion No. 578, May 11, 1972.

The question as to how to interpret the term "general legislation" first came before the Commission in *EC-COI-80-46,* which concluded, without citation of precedent, that a legislative aide's research concerning general legislation, such as local officials' financial disclosure and the open meeting law, would not be "particular matters," but that research on special legislation, such as "transfer of state-owned land in Acton," would be special legislation. Thus, from the beginning, the Commission has focused on whether legislation affects a single community as the essential attribute of special legislation.

Subsequent Commission decisions, continuing that focus, have repeatedly cited court precedent under the 1966 Home Rule Amendment to the Massachusetts Constitution, codified as Amendments, Article 2, §§ 8 and 9, in

interpreting the meaning of "general legislation." Section 8 uses the terms "general laws" and "special laws," stating: "The general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special legislation enacted" in specified, limited circumstances. Thus, in the context of the Home Rule Amendment, the question whether an act applies to a single city or town is determinative of whether it is prohibited special legislation. Commission precedents citing Home Rule Amendment decisions are *EC-COI-81-81,* citing Opinion of the Justices, 356 Mass. 775 (1969); *EC-COI-82-153,* citing Belin v. Secretary of the Commonwealth, 362 Mass. 530 (1972), and Opinion of the Justices, 356 Mass. 775, supra; *EC-COI-82-169,* citing Belin, supra, Town of Arlington v. Board of Conciliation and Arbitration, 370 Mass. 769 (1976), and Mayor of Boston v. Treasurer and Receiver General, 384 Mass. 718 (1981); *EC-COI-82-175,* citing Belin, supra; *EC-COI-89-8,* citing Belin and Mayor, supra; *EC-COI-90-17,* same. These precedents are the basis for the existing Commission interpretation of the meaning of "general legislation" and the attributes of special legislation described above in Section 2.

7. Discussion of criticisms

On its face, the Commission's decision to look to case law under the Home Rule Amendment as a source of guidance in interpreting the term "general legislation" as used in the conflict law was not unreasonable, given the similarity in terms ("general legislation" and "general laws"). Nonetheless, the decision to rest the Commission's interpretation of "general legislation" on precedents decided under the Home Rule Amendment is subject to two valid criticisms.

First, since the Home Rule Amendments postdate the conflict law by four years, the drafters of the conflict law obviously did not have Home Rule Amendments case law in mind when they chose to use the term "general legislation." On grounds of chronology alone, it would make more sense to interpret the term "general legislation" in light of the Article 10 case law. However, no Commission precedent in this area cites an Article 10 case.

Second, in the area of the Home Rule Amendments, there is no reason to presume that legislation is, or is not, special legislation. The purpose of the Home Rule Amendments was to limit the General Court's power to act in relation to towns and cities to specified circumstances, Belin, supra, 362 Mass. at 534-535, and to grant cities and towns independent municipal powers which they did not previously inherently possess. Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339, 358 (1973). In that context, there is no reason to presume that legislation is, or is not, special legislation, and the Home Rule Amendment cases do not invoke any such presumption.

By contrast, in the area of the conflict of interest law, constitutional concerns under Articles 21 and 22 come into play, since a determination that legislation is not "general legislation" will mean that some voters will not have "equality of influence in shaping legislation."

For both these reasons, the Commission has revisited its precedents with respect to the distinction between "general" and "special" legislation, and has revised its interpretation of those terms as set forth above in Section

1. The precedents listed in Section 2 are overruled to the extent that they are inconsistent with the definitions set forth in Section 1.

Disclaimer

This Advisory is intended to summarize the State Ethics Commission's advice concerning compliance with the conflict of interest law and is informational in nature. It is not a substitute for advice specific to a particular situation, nor does it mention every aspect of the law that may apply in a particular situation. Public employees can obtain free, confidential advice about the conflict of interest law from the Commission's Legal Division by submitting an **online request** (/files/documents/2019/01/03/requestadviceform.pdf) on our website, by calling the Commission at (617) 371-9500 and asking to speak to the Attorney of the Day, or by submitting a written request for advice to the Commission at One Ashburton Place, Room 619, Boston, MA 02108, Attn: Legal Division.

REFERENCED SOURCES:

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